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Supreme Court of the United States

October Term, 1949

No. 3

THE UNITED STATES OF AMERICA, *ex rel*,
RICHARD EICHENLAUB,

Petitioner,

against

EDWARD J. SHAUGNESSY, as Acting District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 12) is reported at 167 F. 2d 659. The opinion of the District Court is not reported (R. 8-9).

Jurisdiction

The judgment of the Court of Appeals was entered May 3, 1948 (R. 15). The time for filing the petition for a writ of certiorari was extended by order dated July 30, 1948, of Chief Justice Vinson to and including September 3, 1948 (R. 16). Application for certiorari was made on September 2, 1948, and was allowed on June 27, 1949 (R. 17). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101 (c).

Questions Presented

Whether the warrant for petitioner's deportation is not invalid on any of the following grounds:

1. The special deportation statute here involved, Act of May 10, 1920, does not extend to the offenses referred to in in the first count of the indictment to which petitioner pleaded guilty.

2. Petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

3. The warrant of deportation contains no lawful ground of deportation.

Statutes Involved

The Act of June 15, 1917, c. 30, Title VIII, 40 Stat. 226, provides in part (22 U. S. C. 233):

> "Sec. 3.—Whoever, other than a diplomatic or consular officer or attache, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The Act of March 28, 1940, c. 72, 54 Stat. 80, provides in part (22 U. S. C. 601):

> "Sec. 6—Whoever, other than a diplomatic or consular officer or attache, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be

punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

The Act of May 10, 1920, c. 174, 41 State. 593, provides in part (8 U. S. C. 157):

"Aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported in the manner provided in sections 155 and 156 of this title, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

(1) All aliens who since August 1, 1914 have been or may hereafter be convicted of any violation or conspiracy to violate any of the following sections, the judgment on such conviction having become final, namely:

(a) Sections 25, 27, 21-29, 98, 130-133, 288, 343-346, 349, 381, 502, 535, 536, 475, 611-633 of Title 18, Sections 213, 220-222, 231-233, 234, 235, 238-245 of Title 2, and Sections 31-4, 191-194 of Title 50."

Statement of Facts

The petitioner was lawfully admitted into the United States on February 23, 1930, and became a citizen thereof by naturalization on November 17, 1936 (R. 3). He is married and his wife is a resident of the City and State of New York. For approximately twelve years after taking up residence in the United States, he was continuously employed and there is no indication that at any time during this period did he run afoul of federal, state or municipal

authorities. Nor is there any indication of any word or deed by petitioner which can be construed as hostile to the United States prior to or at the time of his naturalization. He is a simple man of limited education and understanding.

On January 2, 1942, the petitioner was sentenced in the United States District Court for the Eastern District of New York to a term of imprisonment for eighteen months following his plea of guilty to one of two counts of an indictment charging him with having conspired to act as an agent for a foreign government without being registered and as such agent, to accumulate information for transmittal to a foreign government, in violation of Section 88, Title 18, U. S. C. (R. 4).

Upon the expiration of his sentence, the petitioner's certificate of naturalization was cancelled in the United States District Court for the Southern District of New York by a decree entered January 25, 1944, wherein reference was made to a "consent and waiver" by petitioner to such cancellation. On April 19, 1944, a warrant for the arrest of the petitioner was issued and he has since that time been held in the custody of respondent (R. 1-2). Thereafter deportation proceedings were instituted against petitioner and an order was made therein recommending that he be deported to Germany (R. 4). An appeal therefrom was taken to the Board of Immigration Appeals, which upheld the recommendation that the petitioner be deported on the following charge:

> "The Act approved May 10, 1920, in that, he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914, has been convicted of conspiracy (18 U. S. C. 88) to violate a part of an act entitled 'An Act to punish acts of interference with the foreign relations, the

neutrality and the foreign commerce of the United States, to punish espionage, and better, to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 (22 U. S. C. 233)."

A warrant of deportation was issued on October 9, 1945, directing that the petitioner be deported to Germany (R. 1-2).

The petitioner thereupon applied for a writ of habeas corpus on the ground that the warrant of deportation was based on an erroneous construction of Section 157 of Title 8, U. S. C., the deporting statute, in that said statute does not provide for the deportation of petitioner and that the petitioner is therefore illegally detained, imprisoned and restrained of his liberty.

The writ was granted and a return was filed thereto. Argument was heard thereon, but the writ was dismissed (R. 8-9). On appeal (R. 10-11) the Court of Appeals for the Second Circuit affirmed the order of the District Court (R. 12-14).

Although petitioner was at large, engaged in defense work, and completely free from restraint after his discharge from prison on April 15, 1943, following the service of his sentence at Milan, Michigan, to April 19, 1944, a period of over twelve months, during which the war between the United States and Germany was being waged relentlessly, it is significant that the petitioner was not considered so dangerous in the opinion of the United States Attorney for this District and his subordinates as to move them to detain petitioner as a person dangerous to the security of the nation. Following the denaturalization of petitioner and for a period of almost four months thereafter, the Attorney General of the United States failed to bring about his in-

ternment as a dangerous enemy alien, as was done in the case of numerous aliens placed in detention camps in various parts of the country, as a security measure.

The respondent's return to the writ of habeas corpus herein (R. 6:8) sought to attribute to the petitioner Eichenlaub (the owner of a restaurant frequented by one or two customers later found to be trained undercover operators for the Reich) some guilty knowledge of violation of several penal statutes with which he was in nowise connected and to which he did not plead guilty.

The petitioner pleaded guilty to the first count only of the indictment, which charged a conspiracy under U. S. C., Title 18, Section 88, (R 2), and an overt act involving him in the alleged system and organization operated in the United States for the purposes of obtaining, collecting and receiving information of a military, naval, commercial or industrial nature, and data concerning the movement and description of cargo ships of American foreign registry. The said overt act consisted of a conference he had with an individual named Eberling on June 10, 1941, within a month of the time when he was indicted and several months prior to the commencement of the war between the United States and Germany.

The petitioner, who had no criminal record prior to the conviction on a plea of guilty to the above count, which was the lesser of the two counts in the indictment, had as the only alternative the matter of standing trial with thirty-two other defendants, some of whom were alleged to be in communication with the enemy by radio, on a sweeping conspiracy charge of espionage. Subsequent developments at that trial served to reveal how some of the defendants, notably the petitioner, were innocent sources of information used by trained and clever undercover agents operating in this country as mediums for procuring isolated data

later assembled by ingenious methods to convey intelligence to foreign central intelligence headquarters.

The said conspiracy charge was well analyzed by the Circuit Court of Appeals for the Second Circuit in an opinion written on November 8, 1945, upon an appeal taken by one of the thirty-three defendants who stood trial and was convicted and sentenced after Mr. Eichenlaub's plea, at which time the Court discussed at considerable length the very underhanded and surreptitious devices to which that appellant, one Heine, resorted to deceive and conceal from those with whom he associated or from whom he obtained information his real intentions and purposes. See *United States* v. *Heine*, 151 F. (2d) 813.

While it is clear that the conviction of petitioner may not be attacked in this proceeding, it is nevertheless true that the attribution of "undesirability", "deportability", "moral turpitude" or any felonious purposes to the petitioner on the basis of his plea to a statutory conspiracy charge on which he received the lightest sentence imposed on any of his co-defendants, smacks of the hysteria of those first Pearl Harbor days during which the jury, who tried most of those indicted with him, was moved to declare all of the defendants before them guilty of everything charged, and disregard the same judicial standards which the appellate courts have since laid down.

Assignment of Errors

The Circuit Court of Appeals erred:

1. In holding that the special deportation statute here involved, Act of May 10, 1920, extends to offenses under Section 3 of Title VIII of the Act of June 15, 1917, as affected by Section 6 of the Act of March 28, 1940.

2. In holding that petitioner's conviction of conspiracy to violate 22 U. S. C. A. 233 before his denaturalization, had the same force and effect as the conviction of an alien for the violation of that statute, under the Act of 1920.

3. In holding that the warrant of deportation was sufficient in law and contained lawful ground for the deportation of petitioner.

4. In affirming the order dismissing the writ of habeas corpus.

POINT I

The special deportation statute here involved, Act of May 10, 1920, does not extend to offenses under Section 3 of Title VIII of the Act of June 15, 1917, as affected by Section 6 of the Act of March 28, 1940.

The 1920 Act provided that a person convicted of a conspiracy to violate the 1917 Act could be deported if found to be an undesirable resident of the United States. This special deportation statute went further than the general statutory deportation provisions which provided deportation for conviction of one crime involving moral turpitude committed within five years after entry, or two such convictions at any time after entry, and provided an extremely stringent rule for the special deportation of aliens already convicted before the 1920 Act was passed and for aliens who at any time in the future, without limitation, might be convicted of one such offense.

It may be true that deportation under this 1920 Act is not double jeopardy or punishment for crime in the technical sense permitting the alien to invoke constitutional protections against double jeopardy or ex post facto laws

of punishing him for offenses already committed. *U. S. ex rel Bilokumsky* v. *Tod*, 263 U. S. 149; *Mahler* v. *Eby*, 264 U. S. 32; *United States* v. *Commissioner*, 5F. (2d) 162 (C. C. A. 2); *Sichotsky* v. *United States*, 277 Fed. 762 (C. C. A. 9). On the other hand it is recognized that even deportation under the general statutes, and *a fortiori* in this case, is a most severe hardship on the individual.

In *United States* v. *Bridges*, 326 U. S. 135, the Court said:

> "Here the liberty of an individual is at stake. * * * We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised less the procedure by which he is deprived of that liberty does not meet the essential standards of fairness."

The 1920 Act, although not penal for purposes of certain particular constitutional protections, is subject to the same rule of statutory construction as penal statutes and should not be extended by implication.

The Act of 1920 enumerates the statutes, convictions under which may supply the basis for this special deportation. It is evident that convictions under similar statutes adopted after World War II, could not be the basis for deportation under the Act of 1920. Equally, the Act of 1920 should not be construed as applying to a conviction under the Act of 1940, materially changing the Act of 1917. The Act of 1940 increases the punishment for the offenses defined in Sec. 3 of Section VIII of the Act of 1917 from imprisonment up to five years or a fine of not more than $5,000, or both,

to a mandatory sentence of not more than ten years and, in addition, a permissive fine of not more than $5,000. Under the 1940 Act, unlike the 1917 Act, the Court is required to give a jail sentence. Since the Congress increased the punishment for these offenses it is not to be inferred, in the absence of the most compelling reasons, that Congress also intended to make a convicted person subject not only to the increased penalties, but also to the deportation applicable to the 1917 Act. It is submitted that in the absence of the plainly expressed intent that this result was to follow, the 1920 Act should not be construed as applying to offenses under the 1917 Act as changed by the 1940 Act.

There is ample authority for the foregoing proposition. In the case of *Norriss* v. *Crocker*, 13 How. 429, the defendants were sued in an action of debt to recover the penalty of $500 upon the fourth section of the Act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice and persons escaping from the service of their masters. That section provided that any person who should knowingly and unwillingly obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive of labor * * * should forfeit and pay for each of the offenses the sum of $500.

While the action brought under this section against the defendant was pending, Congress in 1850 (9 Stat. at L. 462) passed an act which embraced the offenses specified in the Act of 1793, and created new offenses and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding £1,000 and imprisonment not exceeding six months. The Act of 1850 contained no clause repealing in specific terms the Act of 1793.

The Court held, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, and observed that as a general rule it was "Not open to controversy, that when a new statute covers the whole sub-

ject of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, the former statute is repealed by implication, as the provisions of both cannot stand together."

When repugnant provisions such as the foregoing exist between two statutes, the second is held according to all authority to operate as a repeal of the first, for the later statute expresses the will of Congress as to the manner in which the offense shall be subsequently regarded.

It is true in the instant case that Section 601 does not expressly repeal Section 233 and repeals by implication are not generally looked upon with favor. Where we have two acts dealing with the same subject, it is concededly desirable to give effect to both if possible. But, if two statutes are repugnant in any of their provisions, the later statute, though it contains no repealing clause, operates as a repeal of the first. Moreover, even where the two statutes involved are not in express terms repugnant, if the later legislative act covers all of the subject matter embodied in the first, and embraces new provisions indicating that it was intended as a substitute for the first act, the second statute will operate as a repeal of the first statute. *Davies* v. *Fairbairn*, 3 How. 636; *Bartlett* v. *King*, 12 Mass. 537; *Com.* v. *Cooley*, 10 Pick. 37; *Pierpont* v. *Crouch*, 10 Cal. 315; *Norriss* v. *Crocker*, 13 How. 429; *Sedg. Stat. Law* 126.

Furthermore, even if Section 601 was only amendatory as the Courts below intimated, nevertheless, an amending act or statute may also operate as a repeal. *People* v. *Zito*, 237 Ill. 434, 82 N. E. 1041; *Goodno* v. *City of Oshkosh*, 31 Wis. 127.

This is particularly true where the provisions of the two statutes are in irreconcilable conflict. *McDowell* v. *Fuller*, 169 Mich. 332, 135 N. W. 265; *Jacobus* v. *Meskill*,

56 N. J. L. 255; *People* v. *Angle*, 109 N. Y. 564, 17 N. E. 413.

It is equally true where the amendment is intended as a substitute for existing law. *Lowe* v. *Bourbon County*, 5 Kan. Ap. 603, Pac. 579; *Vanderveer* v. *Herbert*, 76 N. J. L. 173, 68 Atl. 909; *Taylor* v. *Stase*, 87 Tex. Ar. 3300, 221 S. W. 611.

The Courts below seem to suggest in their opinions that although the petitioner was convicted on September 4, 1941 (on a guilty plea to the first count of an indictment filed in July 1941) over a year after enactment of the Act of 1940, the present legal question may be avoided by assuming the petitioner was convicted under the 1917 Act without reference to the 1940 Act. It is submitted that this suggestion appears to be based upon the reference in the indictment to 22 U. S. C. Sec. 233, the original United States Code reference for Section 3 of the 1917 Act. After enactment of the 1940 Act, Section 3 of the 1917 Act, as amended by Section 6 of the 1940 Act, appears in the United States Code as 22 U. S. C. Section 601. It is submitted that this suggestion of the courts below that conviction rested on the 1917 Act apart from the 1940 Act (1) is unsound, and, in alternative (2), if accepted the conviction was invalid and no basis for deportation.

1. The Government certainly would not concede that reference in the indictment to Section 233 instead of Section 601 would bar it from invoking the increased penalties of the 1940 Act. Equally the Government may not here contend that conviction was under the 1917 Act alone. When the petitioner was indicted and convicted in 1941, the 1940 Act was part of the law and the appellant could not be convicted without relying on the 1940 Act.

2. If, in the alternative, the conviction was under the 1917 Act alone the conviction was invalid because the 1917

Act had ceased to exist except as it was a part of the 1940 Act. After enactment of the 1940 Act the Government could not proceed under the 1947 Act alone.[1] If the conviction was under the 1917 Act alone it was not a lawful conviction and was no basis for deportation. It is submitted, therefore, that the deportation act of 1920 does not extend to this offense under the subsequent 1940 Act in the absence of a clear showing that Congress so intended.

As further evidence that Congress did not intend that the deportation act of 1920 extend to the offense involved herein under the subsequent 1940 Act, the Court's attention is invited to a reading of the following sections of the act of 1920 (c. 174, 41 Stat. 593):

> "Aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported in the manner provided in sections 155 and 156 of this title, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit:
>
> "(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following acts or part of acts, the judgment on such conviction having become final, namely:
>
> "(a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and partly to enforce the criminal laws of the United States, and for other pur-

[1]This situation of an amended act is, of course, different from a prosecution which may proceed under a repealed statute (1 U. S. Sec. 29).

poses,' approved June 15, 1917, *or the amendment thereof approved May* 16, 1918.

"(b) An Act entitled 'An Act to prohibit the manufacture, distribution, storage, use and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use and possession of the same, and for other purposes,' approved October 6, 1917;

"(c) An Act entitled 'An Act to prevent in time of war departure from and entry into the United States contrary to the public safety,' approved May 22, 1918;

"(d) An Act entitled 'An Act to prevent the lawful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes,' approved April 20, 1918;

"(e) An Act entitled 'An Act to authorize the President to increase temporarily the military establishment of the United States,' approved May 18, 1917, *or any amendment thereof or supplement thereto;*

"(f) An Act entitled 'An Act to punish persons who make threats against the President of the United States,' approved February 14, 1917;

"(g) An Act entitled 'An Act to define, regulate and punish trading with the enemy, and for other purposes,' approved October 6, 1917, *or any amendment thereof.*"

It is significant that the language in subsections (e) and (g) above, expressly indicates that it was the intention of Congress that the Act of 1920 apply not only to the said

subdivisions in their then present forms, but to "*any amendment thereof or supplement thereto.*"

On the other hand, the complete absence of any similar language in subdivision (a) plainly reveals that it was not the intent of Congress that the act of 1920 extend to offenses committed under any amendments of section (a) of the said statute. It therefore follows that if subdivision (2) above was modified by Section 601 and the deporting statute lacks any reference to offenses committed in violation of the later section, the modified statute, the petitioner was not convicted of any offense for which he could be deported and no further proceedings can be had under subdivision (2) once that section was altered.

This principle is abundantly supported by numerous decisions of this Court. In *Yeaton* v. *United States*, 5 Cranch 281, 283, Chief Justice Marshall stated:

> "It has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In the case of *Maryland* v. *Baltimore & Ohio R. R. Co.*, 3 How. 534, 552, Chief Justice Taney stated:

> "There can be no legal conviction, unless the law creating the offense be at the time in existence. By the repeal, the legislative will is expressed that no further proceedings be had under the act repealed."

See also *Norriss* v. *Crocker*, 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506.

To the same effect is the case of *U. S.* v. *Chambers*, 291 U. S. 217, wherein Mr. Chief Justice Hughes stated:

> "This Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution which repealed the Eighteenth Amendment was consummated on December 5, 1933. Upon the ratification of the Twenty-first Amendment the Eighteenth Amendment at once became inoperative. Neither the Congress nor the Courts could give continued vitality. The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment for a violation of the National Prohibition Act alleged to be consummated in North Carolina, did involve an attempt to continue the application of the statute provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. *In case a statute is repealed or rendered inoperative no further proceeding can be had to enforce it in pending prosecution unless competent authority has kept the statute alive for that purpose.*" (Italics ours).

It follows therefore that there is no basis for the assumption of the Court below, that the 1940 Act did not materially change 22 U. S. C. A. 233 and in the absence of any expressed intention of the Congress to the effect that 8 U. S. C. 157 extends to the 1940 Act, it was error for the Courts below to so hold. Congress used language in the 1920 Act which properly construed, indicated that an alien convicted under the 1917 Act was deportable. It specifically failed to provide for the deportation of anyone convicted under an amendment of the provision involved herein although it well knew how to provide to make this act

effective and extend it to violations of amendments to certain other sections of that same statute as has been shown above.

In other words, the failure of Congress expressly to extend the 1920 Act to include Section 601, was obviously intentional and the Courts should refrain from effectuating by judicial construction that which Congress itself did not intend to accomplish, expressly or by implication.

POINT II

The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

The act of 1920 refers to aliens convicted under the 1917 Act. At the time of his conviction in 1941, the petitioner was a naturalized citizen and had been naturalized under court decree for over five years. It was subsequent to service of his present sentence for the conviction and at the height of the war in 1943, and before the protective decisions of *Baumgartner* v. *United States*, 1944, 322 U. S. 665, requiring clear proof, and *Klapprott* vs. *United States*, 1949, 335 U. S. 601, 335 U. S. 942, requiring an inquest or hearing before the entry of a denaturalization judgment, and thus restraining the Department of Justice in these cases, that petitioner was persuaded to consent to cancellation of his naturalization rather than contest the proposed allegations of the Government's complaint convicted as he then stood of the non-registration charge to which he had pleaded guilty before the assault on Pearl Harbor, but for which he was not sentenced until some time thereafter.

The Courts below upheld the Government's contention that the rule of retroactivity of cancellation of citizenship operates in effect to make petitioner an alien at the time he was convicted in 1941 and thus brought him within the 1920 Act. The case of *Rosenberg* vs. *United States*, 60 F. 2d

475 (C. C. A. 3) was cited as authority for this proposition. The dictum in the *Rosenberg* case, on which the Court relied, however, held merely that a certificate of naturalization issued by a New York Court was void on the ground that the New York Court was without jurisdiction because the alien was a resident of Pennsylvania and had falsely stated that he was a resident of New York. All that dictum stands for is that a decree entered by a Court without jurisdiction is, of course, void and confers no rights. Such a decree and the certificate of naturalization issued thereunder could be collaterally attacked. In this case, however, the Court which naturalized petitioner had full jurisdiction both of the subject matter and of the person.

As against the *Rosenberg* case, the only authority cited by the Government and the Court below in support of their extraordinary position, the following numerous cases show that the decree upon which petitioner's certificate of naturalization was issued could not have been collaterally attacked:

Tutun vs. *United States*, 270 U. S. 568, 577 (1926). (The judgment granting a naturalization certificate entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside):

Behrensmeyer vs. *Kreitz*, 26 N. E. 704 (Ill. 1891), (Certificate of naturalization presented by voter);

Johansen vs. *Staten Island Shipbuilding Co.*, 272 N. Y. 140 (1936) (whether a naturalized citizen's wife a citizen);

Oehlert vs. *Oehlert*, 124 N. E. 249 (Mass. 1919) (divorce action);

United States vs. *Ragazzini*, 50 Fed. 923 (C. C. S. D. N. Y. 1892) (indictment for selling naturalization certificate procured by fraud);

United States vs. *Parisi*, 24 F. Supp. 414, 420 (D. C. Md. 1938, per Chesnut, J.) (dictum);
Matter of Wolton, 125 Misc. 564 (Sup. Ct. N. Y. Co. 1925, per Levy, J.) (Same);
In re Fordiani, 120 Atl. 338 (Conn. 1923) (Same);
Yamashita vs. *Hinkle*, 260 U. S. 199 (1922) (invalidity appearing on the face of the certificate);
In re Gee Hop, 71 Fed. 274 (N. D. Cal. 1895) (Same);
Sato vs. *Hall*, 217 Pac. 520 (Cal. 1923) (Same).

It is submitted that the rule of retroactive cancellation has never been and should not be applied in so extreme and harsh a manner. The reference by Congress in the 1920 Act to *aliens* certainly was not intended to include naturalized citizens who might subsequently have their naturalization cancelled. As was so well stated in the majority opinion in *Madeiros* vs. *Watkins*, 166 F. (2d) 897, at page 900, the strictest proof is required if the determination will result in severing one from his home, business and all present connections.

This Court has frequently held that where there is doubt as to the meaning of the statute under which it is sought to deport petitioner, such doubt shall be resolved in favor of the alien. *Fong Haw Tan* vs. *Phelan*, 333 U. S. 6, 10 (1948); citing *Delgadillo* vs. *Carmichael*, 332 U. S. 388. In the *Delgadillo* case, the Court made these significant remarks:

> "Deportation can be the equivalent of banishment or exile. *See Bridges* vs. *Wixon*, 326 U. S. 135, 147, 89 L. ed. 2103, 211, 65 S. Ct. 1443. The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and

> capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."

This Court there held that it was a capricious application of the immigration laws to maintain that re-entry to the United States of a shipwrecked seaman from a foreign port to which he had been taken, was an entry within the meaning of the statutory provision subjecting to deportation an alien convicted of a crime within five years after entry. A *fortiori* it is a capricious application of the Act of 1920 to treat as a convicted alien a convicted citizen subsequently denaturalized.

Again, too strong emphasis cannot be placed on the fact that the education of the petitioner is meager. His understanding of the English language itself is limited. He had been employed for ten months in defense work following his release from prison after the service of his sentence at Milan, Michigan, early in 1943, and he insistently contends that he signed the consent believing that if he contested the case the Government would regard him and his wife as recalcitrants and make a *permanent* court record of his denaturalization, whereas, if he consented, the effect would merely be a *suspension* of citizenship privileges for the duration of the war.

No claim was made that he was ever informed or advised of his constitutional rights or any possible interrelationship of what he was signing with his right of domicile or deportability. He was not taken before the Court after he signed the so-called cancellation and waiver prepared by an assistant district attorney, so that the Court might make sure that he understood the significance of the proceedings.

In a similar case, *United States of America* vs. *Olden*, 84 Fed. Supp. 522, where counsel for petitioner herein appeared as the attorney for the defendant Olden, at a hearing on a motion to vacate a judgment of denaturalization entered in the United States District Court for the Southern District of New York on July 7, 1942, on a so-called consent of the defendant without a hearing or inquest, Judge Rifkind held that defendant's consent, though given without duress or coercion, was not an intentional surrender of citizenship made by one possessed of understanding of the proceedings or awareness of his rights and of the consequences of his act, and vacated the judgment.

The Court in that case also pointed out that he held a hearing and took evidence to determine the factual question whether defendant's consent to denaturalization was truly voluntary and consciously intended by him to effect the surrender of his citizenship. "Had the hearing revealed such conscious intent," said the Court, "it might have become necessary to consider the effect of the most recent Supreme Court decisions upon the proposition that a consent judgment rendered without inquest or hearing may be invalid," citing *Klapprott* v. *United States, supra.*

In the light of the language contained in the prevailing opinion of the Court, in the case last cited, the consent judgment rendered without inquest or hearing in the instant case would appear to be invalid and void. The following language in the *Klapprott* opinion is pertinent:

> "Thus it appears that statutes and rules have largely left for judicial determination the type of cases in which hearings and proof should precede default judgments. In this situation it is the final responsibility of this Court to formulate the controlling rules for hearings and proof. See *McNabb* v. *United States*, 318 U. S. 332, 341. For the following reasons it seems peculiarly appropriate that a

person's citizenship should be revoked only after evidence has established that the person has been guilty of prohibited conduct justifying revocation. * * * This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U. S. C. Sec. 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U. S. 276, 284. * * * Furthermore 60 (b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. * * * Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of 60 (b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

In view of the decision in the Klapprott case, it is inequitable that the judgment of denaturalization entered against petitioner on a consent which was neither conscious nor voluntary, should have *prospective* application. A fortiori, it is a positive miscarriage of justice to attribute to Congress a purpose to make peti-

tioner's right to remain here dependent on a tortured construction of the Act of 1920 by applying the judgment of denaturalization *retroactively* and thus treating a convicted citizen subsequently denaturalized as though he were a convicted alien.

Where under the stress and necessities of war conditions, errors of officials and mistakes of individuals result in hardships on persons long domiciled here, the Government should be slow to afflict and quick to make retribution, neither reluctant nor evasive in correcting wrongs inflicted upon citizens, since a forthright recognition of injustice is the surest means of maintaining faith and confidence in our system of law. *Abo* v. *Clark*, 77 F. Supp. 806.

CONCLUSION

For the foregoing reasons, it is respectively urged that the judgment should be reversed and that petitioner be released on habeas corpus.

Respectfully submitted,

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